

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITION OF)	
COX VIRGINIA TELECOM, INC.)	
)	
v.)	
)	
GTE SOUTH, INC.)	CASE NO. PUC 990046
)	
For enforcement of interconnection)	
agreement for reciprocal compensation)	
for the termination of calls to)	
Internet Service Providers)	

and

PETITION OF)	
STARPOWER COMMUNICATIONS)	
)	CASE NO. PUC990023
For Declaratory Judgment)	
Interpreting Interconnection Agreement)	
with GTE South, Inc.)	

COMMENTS OF AT&T COMMUNICATIONS OF VIRGINIA, INC.

Less than two years ago, after considering an extensive record on the issue, the Commission properly found that an incumbent local exchange carrier – Bell Atlantic – was obligated to pay reciprocal compensation when one of its customers placed a call to an Internet service provider (“ISP”) served by another local carrier.¹ GTE is now asking this Commission to effectively reverse that decision as it considers the substantially similar petitions filed by Cox Virginia Telecom, Inc. and Starpower Communications. Such a policy shift would allow

¹ *Petition of Cox Virginia Telecom, Inc.*, Case No. PUC970069, 1997 SCC Ann. Rep. 298 (Oct. 243, 1997).

GTE to avoid paying reciprocal compensation (or any other form of intercarrier compensation) to carriers who deliver calls from GTE customers to ISPs served by Starpower or Cox.

While GTE insists that the Federal Communications Commission's ("FCC's") recent decision on the jurisdictional status of calls to ISPs virtually mandates the reversal it seeks, the simple truth is that the FCC's Ruling establishes no such requirement.² Indeed, the FCC's Ruling is directly at odds with GTE's claim, because the decision specifically affirms that state commissions continue to have full authority to maintain the status quo with regard to reciprocal compensation for ISP-bound traffic. GTE has provided no reasonable basis for the Commission to reverse the position it took on the identical issue in the Bell Atlantic – Cox dispute.

Furthermore, Starpower and Cox persuasively argue that the language in their respective interconnection agreements with GTE reflect the parties' intent and understanding that ISP-bound traffic be treated as local for reciprocal compensation purposes. This was consistent with the industry-wide understanding of the treatment of ISP-bound treatment at the time the agreements were negotiated and signed. Accordingly, the intent of the contracting parties should be honored.³

² See Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (Order No. FCC 99-38), *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, released February 26, 1999 (hereinafter referred to as "ISP Jurisdictional Ruling").

³ Indeed, a policy change at this late date in the life of many interconnection agreements between GTE and CLECs not only would harm carriers that detrimentally relied on the Commission's earlier decision, but would be unnecessary in light of the fact that the parties to these agreement will have a full opportunity to negotiate on this very issue.

Separate Statement of Commissioner Susan Ness (emphasis in original)

(footnote omitted).⁴

Contrary to GTE's implication that this Commission has little choice but to deny reciprocal compensation on ISP-bound traffic, the FCC found that, even in cases where a state commission does not find that the parties voluntarily agreed on an intercarrier compensation scheme, or where a state has not addressed the issue, "state commissions may nevertheless determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic." ¶ 25. State commissions may make such determinations "pursuant to *contractual principles or other legal or equitable considerations*, that reciprocal compensation is an appropriate interim inter-carrier compensation rule" pending completion of the FCC's rulemaking on this issue. ¶ 27 (emphasis added).

Significantly, the decisions concerning this issue subsequent to the issuance of the FCC's Order have determined overwhelmingly that, notwithstanding the FCC's jurisdictional ruling, reciprocal compensation is payable on ISP-bound traffic.⁵ For example, in neighboring Maryland, the Public Service Commission concluded that in the absence of a FCC rule, the parties may have reasonably agreed to apply reciprocal compensation to ISP-bound traffic under their interconnection agreement.⁶ The Maryland PSC

⁴ Commissioner Ness further clarified that the FCC's decision "does not unravel the core determinations of more than two dozen state commissions that have addressed this issue." *Id.*

⁵ A table containing citations and a summary of recent state regulatory commission and federal court decisions concerning the ISP/reciprocal compensation issue is provided as Attachment A.

⁶ *In the Matter of the Complaint of MFS Intelnet of Maryland, Inc. Against Bell Atlantic – Maryland, Inc. for Breach of Interconnection Terms and Request for Immediate Relief*, Order No. 7528, Case No. 8731 (June 11, 1999) at 8.

concluded that “[a]t the time the interconnection agreement [between MFS and BA-MD] was entered into, ISP traffic was treated as local in virtually every respect by all industry participants, including the FCC.” *Id.* at 12. Because this treatment of ISP-bound traffic was so prevalent, the Maryland PSC found that BA-MD had an obligation to negate such local treatment in interconnection agreements by specifically excluding ISP traffic from the definition of local traffic. *Id.* at 13. The Maryland PSC proceeded to find that the “absence of such a specific exclusion or exception to be persuasive of the fact that BA-MD did not intend to exclude ISP traffic from the definition of local traffic” *Id.* at 14. The Maryland PSC thus concluded that BA-MD intended to pay reciprocal compensation on such traffic and accordingly ordered BA-MD to pay reciprocal compensation within 15 days of the issuance of the order. *Id.* at 15.

The Maryland PSC decision is not the exception. Eleven of the 12 reported post-FCC *ISP Jurisdictional Ruling* decisions confirm this result. GTE, however, ignores these decisions and instead cites an anomalous Massachusetts Department of Telecommunications and Energy decision to the contrary. GTE Starpower Memorandum at 10. Yet, GTE does not explain that the Massachusetts decision -- which is completely out-of-step with the vast majority of post-FCC decision rulings on this issue -- was based on facts unique to that jurisdiction. Moreover, the Massachusetts DTE specifically recognized that “MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law ‘or other legal or equitable considerations’ give rise to mutual obligation on its and Bell Atlantic’s parts to pay reciprocal

compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement."⁷ DTE Order at 27.

Thus, *ISP Jurisdictional Ruling* provides this Commission with broad authority to interpret the Cox-GTE and Starpower-GTE interconnection agreements and determine that reciprocal compensation must be paid on ISP-bound traffic.

II. THE PARTIES INTENDED THAT ISP-BOUND TRAFFIC BE CONSIDERED LOCAL FOR RECIPROCAL COMPENSATION PURPOSES.

Cox and Starpower appropriately ask the Commission to interpret – and enforce – the plain language of their respective agreements with GTE.⁸ Both Cox and Starpower provide a detailed and compelling discussion of why the language contained in their respective contract lead to the conclusion that ISP-bound traffic was intended to be treated as local and therefore subject to reciprocal compensation. Petition of Cox at 3-11; Petition of Starpower at 4-11.

The FCC recognized that state commissions, construing a particular interconnection agreement to determine whether the parties had reached agreement on reciprocal compensation for ISP-bound traffic, would want to consider such factors as

- whether ISPs have been served out of intrastate or interstate tariffs;

⁷ In what can only be described as the sheerest of coincidences, Bell's Massachusetts's sister company announced a series of rebates and rate reductions just two days after the DTE's decision. In fact, BA-MA directly linked the move to the DTE's decision, stating that it had been "made possible by a state decision to end unjustified fees Bell Atlantic has paid for computer calls to the Internet." Bell Atlantic-Massachusetts Announces Rebates, Rate Reduction, May 21, 1999, <http://www.ba.com/nr/1999/May/19990521006.html>.

⁸ Starpower, of course, opted into the MFS-GTE interconnection agreement that was approved by the Commission in July 1997. GTE's intent must be examined as of 1997 when the MFS-GTE agreement was originally negotiated and executed.

- whether revenues associated with those services were counted as interstate or intrastate revenues;
- whether ILECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic particularly for the purpose of billing one another for reciprocal compensation; and
- whether, in jurisdictions where ILECs bill their end users by message units, ILECs have included calls to ISPs in local telephone charges.

The initial filings demonstrate that GTE, Cox and Starpower each understood at the time their respective interconnection agreements were negotiated and signed, that ISP-bound traffic would be treated as local and subject to reciprocal compensation. Applying the FCC's factors to the instant case shows that

- ISPs in Virginia, whether a customer of GTE or of a CLEC, are served out of an intrastate tariff.
- GTE has not disputed that it treats revenues associated with the provisioning of service to an ISP as intrastate.
- GTE has made no effort to meter or segregate traffic to ISPs. GTE has apparently never sought to include a "percentage of internet use" factor in the interconnection agreements it negotiated and arbitrated with the CLECs.
- Calls from GTE end users to a CLEC's ISP customer within a local calling area are rated as local.

Moreover, as a general principle of law, common industry usage is incorporated into the parties' understanding of the technical terms of their contracts. At the time the subject interconnection agreements were negotiated and executed in 1996 and 1997, the common industry understanding was that ISP-bound calls were treated as local for reciprocal compensation purposes.

Illustrative of this industry understanding is that in a May 1996 filing with the FCC, GTE's merger partner Bell Atlantic, argued in favor of reciprocal compensation, and against mandatory "bill-and-keep." Bell Atlantic expressly recognized that reciprocal compensation would apply to ISP-bound traffic when it stated:

[T]he notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound such as credit card authorization centers **and internet access providers.**⁹

This position – that ISP traffic would be treated as local -- was consistent with the general understanding in the industry at the time that the Virginia interconnection agreements were being negotiated.

Perhaps even more persuasive is that each of the 28 states considering the issue prior to the FCC's *ISP Jurisdictional Ruling* – including Virginia – reached the conclusion that ISP-bound traffic was subject to reciprocal compensation. This striking unanimity of regulatory opinion in interpreting the eligibility for reciprocal compensation can only confirm that the common industry understanding of the treatment of such traffic.

Accordingly, as a matter of contract interpretation, the Commission should find that the parties to Starpower and Cox interconnection agreements intended to treat ISP-bound traffic as local for reciprocal compensation purposes. GTE did

⁹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Bell Atlantic Reply Comments, dated May 30, 1996 at 21 (emphasis supplied).

nothing to specifically exclude this type of traffic from the subject agreements. Indeed, such treatment is perfectly consistent with common industry usage.

CONCLUSION

Although the FCC has now held that calls to ISP are jurisdictionally interstate, it also found that state commissions remain free, absent any contrary federal rule, to continue treating ISP-bound traffic as local calling for purposes of determining call compensation obligations. This Commission found in 1997 that an ILEC should compensate other local exchange carriers for calls the ILEC customers place to an ISP served by the other carrier. Nothing in the FCC's decision requires the Commission to change that approach. Indeed, the FCC's decision expressly recognizes that this Commission, along with the 27 others that currently require compensation for ISP-bound traffic, have authority to maintain the current practice.

There is no reason to change the Virginia policy now. Carriers have consistently treated the traffic in the manner sought by Cox and Starpower. CLECs have competed with GTE for ISP customers with the reasonable belief that carriers would receive reciprocal compensation, and any change in this inter-carrier compensation scheme would directly harm those carriers that proceeded under the good faith belief that ISP bound traffic is local for reciprocal compensation purposes.

Accordingly, AT&T respectfully submits that the Commission should grant the Petitions of Cox and Starpower.

Respectfully submitted,

**AT&T COMMUNICATIONS
OF VIRGINIA, INC.**

By Its Attorneys

Wilma R. McCarey

Wilma R. McCarey
Mark A. Keffer
Ivars Mellups
Michael A. McRae
3033 Chain Bridge Road
Oakton, VA 22185
(703) 691-6043

Dated: July 19, 1999

ATTACHMENT A

STATE DECISIONS POST FEBRUARY 26, 1999 FCC ISP TRAFFIC RULING			
State	Citation	Date	Comment
California	In the Matter of the petition of Pacific Bell for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 256(b) of the Telecommunications Act of 1996, Application 98-11-024 (filed November 16, 1998), Public Utilities Commission of the State of California,	June 24, 1999	California PUC adopted in the Final Arbitrator's Report, and approved an Interconnection Agreement between PacBell and Pac-West Telecomm. In doing so, maintained its current policy of holding PacBell responsible for reciprocal compensation payments for ISP-bound traffic.
Alabama	In Re: Emergency Petitions Of ICG Telecom Group Inc. And ITC Deltacom Communications, Inc. For a Declaratory Ruling, Docket 26619, Alabama Public Service Commission	June 21, 1999 March 4, 1999	PSC upheld reciprocal compensation for ISP-bound traffic under existing agreements on March 4, 1999. PSG granted ICG's motion for Partial Reconsideration and found that ICG is entitled to reciprocal compensation based on the "most favored nations" clause in its interconnection Agreement on June 21, 1999.
Illinois	Illinois Bell Telephone Co. d/b/a Ameritech v. WorldCom Technologies, Inc., Nos. 98-3150, 98-3322 and 98-4080 (7 th Cir.) Slip op. (June 18, 1999)	June 18, 1999	US Court of Appeals for the 7 th Cir. affirms the Illinois Commerce Commission's decision ordering

ATTACHMENT A

STATE DECISIONS POST FEBRUARY 26, 1999 FCC ISP TRAFFIC RULING			
State	Citation	Date	Comment
			Ameritech to pay reciprocal compensation to AT&T for ISP traffic.
Maryland	In the Matter of the Complaint of MFS Intelnet of Maryland, Inc. Against Bell Atlantic – Maryland, Inc. for Breach of Interconnection Terms and Request for Immediate Relief, Order No. 7528, Case No. 8731, Maryland Public Service Commission	June 11, 1999	PSC found that MFS, the parties intended for ISP-bound traffic to be "local" and therefore subject to reciprocal compensation arrangements
Indiana	In The Matter Of The Complaint Of Time Warner Communications Of Indiana, L.P. Against Indiana Bell Telephone Company, Inc., d/b/a Ameritech Indiana, For Violation of The Terms of the Interconnection Agreement, Order on Reconsideration, Cause No. 41097, Indiana Utility Regulatory Commission	June 9, 1999	IURC denied Ameritech's request for rehearing of its decision requiring the payment of reciprocal compensation for ISP traffic.
Mass.	Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116-C	May 19, 1999	DTE concluded that FCC decision superseded DTE's 1998 order. Complaint may be renewed upon claim that contract law or other legal or equitable consideration gives rise to reciprocal compensation obligation for ISP-bound traffic.

STATE DECISIONS POST FEBRUARY 26, 1999 FCC ISP TRAFFIC RULING			
State	Citation	Date	Comment
Washington	WorldCom, Inc., f/k/a MFS Intelenet of Washington, Inc. Complainant, v. GTE Northwest Inc., Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal, and Denying GTE's Counterclaim, Docket No. UT-980338, Washington Utilities and Transportation Commission	May 12, 1999	WUTC upheld reciprocal compensation for ISP-bound traffic under existing agreements.
Hawaii	In the Matter of the Petition of GTE Hawaiian Telephone Company Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation, Docket No. 99-0067, Public Utilities Commission of the State of Hawaii	May 6, 1999	PUC upheld reciprocal compensation for ISP-bound traffic under existing agreements.
Ohio	In the Matter of the Complaints of ICG Telecom Group, Inc., MCIMetro Access Transmission Services, Inc. and Time Warner Telecom of Ohio, L.P., v. Ameritech Ohio, Regarding Payment of Reciprocal Compensation, Case Nos. 97-1557-TP-CSS, 97-1723-TP-CSS and 98-308-TP-CSS; Entry on Rehearing, Public Utilities Commission of Ohio	May 5, 1999	PUC upheld reciprocal compensation for ISP-bound traffic under existing agreements.
Oregon	Electric Lightwave, Inc., v. US West Communications, Inc., Order No. 99-285, Public Utility Commission of Oregon	April 26, 1999	PUC upheld reciprocal compensation for ISP-bound traffic under existing agreements.
Nevada	In re petition of Pac-West Telecomm, Inc. for arbitration pursuant to Section 252 of the	April 8, 1999	PUC upheld reciprocal compensation for ISP-bound traffic

STATE DECISIONS POST FEBRUARY 26, 1999 FCC <i>ISP TRAFFIC RULING</i>			
State	Citation	Date	Comment
	Telecommunications Act of 1996 to establish an Interconnection Agreement with Nevada Bell Docket No. 98-10015; In re petition of advanced telcom group, inc. for arbitration of an Interconnection Agreement with Nevada Bell pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 99-1007, Order Adopting Revised Arbitration Decision, Nevada Public Utilities Commission,		under newly arbitrated agreement.
Delaware	In The Matter Of The Petition Of Global NAPS South, Inc. For the Arbitration Of Unresolved Issues From the Interconnection Negotiations with Bell Atlantic- Delaware, Inc. (Filed December 9, 1998), Docket No. 98-540, Arbitrator's Award, Delaware Public Service Commission	March 9, 1999	Arbitrator permitted CLEC to opt into existing agreement permitting reciprocal compensation for ISP-bound traffic, and found this arrangement permissible under FCC Ruling.

Certificate of Service

Cases PUC990023 & PUC990046

I hereby certify that I have mailed, first-class mail, postage prepaid, or hand-delivered a copy of the foregoing Comments of AT&T Communications of Virginia, Inc. to:

Russell M. Blau, Esquire and Michael L. Shor, Esquire
Swidler, Berlin, Shereff, Friedmann
3000 K Street N.W. Suite 300
Washington, D.C. 20007

Louis R. Monacell, Esquire and Robert M. Gillespie, Esquire
Christian & Barton, L.L.P.
909 East Main Street, Suite 1200
Richmond, Virginia 23219-3095

Stephen P. Spencer, Regional Director-External Affairs
GTE South Incorporated
Three James Center, Suite 1200
1051 East Cary Street
Richmond, Virginia 23219

Richard D. Gary, Esquire
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd St.
Richmond, Virginia 23219-4074

Eric M. Page, Esquire
LeClair Ryan
4201 Dominion Boulevard, Suite 200
Glen Allen, Virginia 23060

John F. Dudley
Senior Assistant Attorney General
Division of Consumer Counsel
Office of Attorney General

900 East Main St. Second floor
Richmond, Virginia 23219

State Corporation Commission
Divisions of Communications
Economics and Finance
Public Utility Accounting
Office of General Counsel
P.O. Box 1197
Richmond, Virginia 23218-1197

Appendix A: Telephone Companies in Virginia [attached].

Appendix B: Long Distance Telephone Companies [attached].

Wilma R. McCreary

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

PETITION OF)	
)	
STARPOWER COMMUNICATIONS, LLC)	
)	Case No. PUC990023
For Declaratory Judgment Interpreting Interconnection)	
Agreement with GTE South, Inc. and Directing GTE to)	
pay reciprocal compensation for the termination of)	
local calls to Internet service providers.)	

**COMMENTS OF KMC TELECOM OF VIRGINIA, INC.,
HYPERION COMMUNICATIONS OF VIRGINIA, LLC. AND
CFW NETWORK, INC. IN RESPONSE TO GTE SOUTH, INC.**

KMC Telecom of Virginia, Inc. ("KMC"), Hyperion Communications of Virginia, LLC ("Hyperion") and CFW Network, Inc. ("CFW") (collectively, the "Joint Commenters"), by their undersigned counsel, and pursuant to the June 22, 1999 Order of the Commission, hereby files its Comments addressing the arguments made by GTE South, Inc. ("GTE") in its Memorandum of Law filed in this matter.

KMC, Hyperion and CFW are individually certificated as competitive local exchange carriers ("CLECs") in the Commonwealth of Virginia. Each Joint Commenter has a Commission-approved interconnection agreement with GTE¹ and is offering local exchange services in Virginia. Hyperion and CFW filed comments in the Commission's earlier proceeding between Cox Virginia Telecom and Bell Atlantic² which addressed – and decided – the very

¹ Each Joint Commenter also has a Commission-approved separate interconnection agreement with Bell Atlantic.

² *Petition of Cox Virginia Telecom, Inc. for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet Service Providers*, Case No. PUC-970069, Final Order (Oct. 24, 1997)(the "Cox Decision").

issue raised by Starpower's complaint. As such, KMC, Hyperion and CFW have a substantial interest in the outcome of this proceeding.

INTRODUCTION

In sum, the Joint Commenters support the position articulated by Starpower in its Complaint and in its response to GTE and oppose the positions taken by GTE. The Commission should reject GTE's arguments and grant Starpower and Cox judgment on the pleadings filed to date in this matter. The Federal Communications Commission's ("FCC") recent *Declaratory Ruling*³ supports the Commission's decision that Incumbent Local Exchange Carriers ("ILECs") in Virginia are required to pay reciprocal compensation to CLECs for the termination of telecommunications services to Internet service providers ("ISPs") originated by their customers.⁴

GTE's arguments fail in two respects: (1) GTE entirely ignores the FCC's determination that, absent federal regulation to the contrary, state commissions maintain the authority to resolve disputes regarding whether ISP-bound traffic is subject to reciprocal compensation; and (2) GTE seriously misrepresents the conclusions and impact of the FCC's *Declaratory Ruling* when it argues that the *Declaratory Ruling* invalidated this Commission's earlier *Cox Decision*. Nothing in the *Declaratory Ruling* yields such a Draconian result. Quite to the contrary. The *Declaratory Ruling* preserves state commission decisions, such as the Commission's *Cox Decision*, that interpret interconnection agreements to require the payment of reciprocal compensation when CLECs terminate traffic to ISPs. The Commission should deny GTE the relief it seeks from its

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Inter-Carrier Compensation for ISP-Bound Traffic* (CC Docket No. 96-68). *Declaratory Ruling* in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68 (rel. Feb. 26, 1999) ("*Declaratory Ruling*").

⁴ *Cox Decision* at 3.

contractual obligations because the *Cox Decision* was correct when it was issued and the Commission's determination in that case remains valid, binding and enforceable against GTE today.

ARGUMENT

I. THE FCC'S *DECLARATORY RULING* MAINTAINS THE COMMISSION'S AUTHORITY TO RESOLVE DISPUTES REGARDING WHETHER ISP-BOUND TRAFFIC IS SUBJECT TO RECIPROCAL COMPENSATION

GTE claims that the *Declaratory Ruling* undermined the finding in the Commission's *Cox Decision* that calls to ISPs constitute traffic eligible for reciprocal compensation: "[T]he Commission's decision in the Cox/Bell Atlantic Order was based on legal interpretations that now have been invalidated."⁵ GTE goes on to argue that, because the FCC has ruled that the "end to end" test for interstate jurisdiction applies to ISP traffic, the Commission's *Cox Decision* rests upon the faulty premise that ISP traffic is jurisdictionally local traffic.⁶ In its Memo, GTE characterizes the *Declaratory Ruling* as concluding that "there is no legal basis for the Commission to award reciprocal compensation for ISP traffic unless that was expressly provided for in the interconnection agreement."⁷

Notwithstanding GTE's strident protests, however, the *Declaratory Ruling* does not remotely lead to that conclusion. Rather, GTE conveniently ignores the FCC's clear proviso that

⁵ GTE Memo at 5.

⁶ *Id.*

⁷ *Id.*

its conclusions regarding the jurisdictional nature of ISP-bound traffic “does not in itself determine whether reciprocal compensation is due in any particular instance.”⁸

In fact, the FCC makes it clear that its determination that ISP-bound traffic is largely interstate does not necessarily resolve the matter of whether incumbent local exchange carriers must pay reciprocal compensation to CLECs for terminating traffic to ISPs. The FCC specifically left this issue to state commissions. The FCC “finds no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.”⁹ Thus, the Commission is free to maintain its current position that ILECs must pay CLECs reciprocal compensation for carrying and terminating such traffic to ISPs, and GTE offers nothing persuasive to the contrary.¹⁰ GTE’s suggestion that the *Cox Decision* is inapplicable to the present case is meritless. To be sure, in *Cox* the Commission interpreted only the interconnection agreement between Cox and Bell Atlantic, but the reciprocal compensation terms of the Cox/Bell Atlantic agreement are not materially different from the reciprocal compensation terms of any other interconnection agreement, including the agreements at issue here.

⁸ *Declaratory Ruling* at ¶ 1.

⁹ *Id.* at ¶ 21. The FCC sought comment on this issue in a Notice of Proposed Rulemaking included in the *Declaratory Ruling*.

¹⁰ The FCC emphasized that nothing in the *Declaratory Ruling* “necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.” *Id.* at ¶ 24.

II. THE FCC'S JURISDICTIONAL CONCLUSION DOES NOT DETERMINE WHETHER RECIPROCAL COMPENSATION IS PAYABLE FOR ISP TRAFFIC

GTE unduly expands the reach of the *Declaratory Ruling*. The FCC made it abundantly clear that its jurisdictional finding did not require any state to change its regulatory treatment of ISP traffic. Rather, the FCC stated that, *for jurisdictional purposes only*, it would treat ISP traffic as a single communication:

We disagree with those commenters that argue that, *for jurisdictional purposes*, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP. As discussed above, the Commission analyzes the totality of the communication *when determining the jurisdictional nature of a communication*. . . . Thus, we analyze ISP traffic *for jurisdictional purposes* as a continuous transmission from the end user to a distant Internet site.¹¹

While drawing these jurisdictional conclusions, the FCC also stated that traffic to ISPs had always been *treated as* local, with all attendant consequences: "Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local."¹² Indeed, the FCC expressly rejected GTE's argument that the jurisdictional determination was dispositive, stating that:

[w]hile to date the [Federal Communications] Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic."¹³

¹¹ *Declaratory Ruling*, ¶ 13 (emphasis added).

¹² *Id.*, ¶ 23.

¹³ *Declaratory Ruling* at ¶ 25.

Since the FCC, itself, would find that compensation is due for ISP traffic, it was perfectly logical for the FCC to conclude that it's decision specifically preserved state decisions that interpret interconnection agreements to require the payment of reciprocal compensation for ISP traffic: The Commission elaborated as follows:

Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP bound traffic.¹⁴

The FCC's determination that applying reciprocal compensation obligations to ISP traffic does not violate any federal law recently was affirmed by the United States Court of Appeals for the Seventh Circuit.¹⁵ In affirming the underlying decisions of the District Court for the Northern District of Illinois and the Illinois Commerce Commission, the Seventh Circuit concluded that just because "the Act does not require reciprocal compensation for calls to ISPs is not to say that it prohibits it. . . . The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out."¹⁶

In short, the mere conclusion that ISP traffic is jurisdictionally interstate does not prevent this, or any other, Commission from determining that the reciprocal compensation provisions of

¹⁴ *Id.*, ¶ 26.

¹⁵ *Illinois Bell Telephone Co. d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, Case No. 98-3150, 1999 WL 436474, (7th Cir., June 18, 1999).

¹⁶ 1994 WL 436474 at 5, slip. op. at 7.

an interconnection agreement apply to ISP traffic. That is exactly what the Commission did in the *Cox Decision*, and GTE offers no persuasive reason why the Commission should retreat from that conclusion in this case.

III. EVERY STATE DECISION ISSUED SINCE THE *DECLARATORY RULING* DIRECTLY INVOLVING GTE HAS CONCLUDED THAT RECIPROCAL COMPENSATION IS OWED FOR ISP-BOUND TRAFFIC.

Since the FCC released the Declaratory Ruling in February, 1999, four state commissions have issued decisions on the issue of reciprocal compensation for ISP-bound traffic in cases directly involving GTE. In each of those cases, the state commissions rejected the very same arguments that GTE makes here and concluded, unanimously, that calls to ISPs are to be treated as local for purposes of reciprocal compensation.¹⁷ These cases confirm that, when read together, the *Cox Decision* and the *Declaratory Ruling* strongly support a decision by the Commission to (1) reject GTE's arguments entirely and (2) enter an order in favor of Starpower and Cox, without a hearing, directing GTE to pay reciprocal compensation for all local traffic, including calls to ISPs.

¹⁷ *In the matter of the Petition of Electric Lightwave, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Incorporated, Pursuant to the Telecommunications Act of 1996*, Arb 91, Order No. 99-218, Commission Decision (Or. P.U.C., Mar. 17, 1999); *Petition of GTE Hawaiian Telephone Company, Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation*, Docket No. 99-0067, Decision and Order No. 16975 (Ha. P.U.C., May 6, 1999); *WorldCom, Inc. v. GTE Northwest Inc.*, Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim, Docket No. UT-980338 (Wa. U.T.C., May 12, 1999); *Request for Arbitration Concerning Complaint of Intermedia Communications, Inc. Against GTE Florida Incorporated for Breach of Terms of Florida Partial Interconnection Agreement*, Docket No. 98-986-TP, Decision (Fla. P.S.C., July 6, 1999)(no written opinion issued yet).

Two decisions from the Washington Utilities and Transportation Commission, one involving an arbitration between GTE and Electric Lightwave ("ELI")¹⁸, the other involving a contract enforcement action between GTE and MCI Worldcom¹⁹, shed light on the issue presented here of whether reciprocal compensation should be paid for ISP-bound traffic given that enhanced service providers are exempt from interstate access charges. In the GTE/ELI arbitration, the arbitrator stated that:

LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network and the terminating LEC does not directly receive any revenue from the customer who originates the call. Even though local-interstate traffic is not addressed by section 251(b)(5) of the Telecom Act, the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges *leads to the equitable conclusion that it also should be treated as local for purposes of reciprocal compensation charges*. The only other alternative would be to apply interstate terminating access charges.²⁰

The Washington Commission adopted the same reasoning in resolving the contract dispute between GTE and MCI Worldcom, stating:

We agree with WorldCom's analysis that, taking into consideration the compensation framework established in the Act, the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation.²¹

¹⁸ *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Electric Lightwave, Inc. and GTE Northwest Incorporated Pursuant to 47 USC Section 252*, Docket No. UT-980370, Arbitrator's Report and Decision (W.U.T.C., March 22, 1999).

¹⁹ *WorldCom, Inc. f/k/a MFS Intelenet of Washington, Inc. v. GTE Northwest Inc.*, Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim, Docket No. UT-980338 (Wa. U.T.C., May 12, 1999).

²⁰ *Id.* at 10 - 11 (emphasis added).

²¹ *WorldCom v. GTE*, *supra*, at 23.

Similarly, in two rulings, one involving US WEST, the other involving GTE, the Oregon Public Utility Commission observed that the *Declaratory Ruling* endorses its determination that reciprocal compensation applies to ISP-bound traffic. First, in an arbitration between ELI and GTE, the Oregon Commission noted that it had:

held in other arbitration proceedings that ISP-bound traffic should be subject to reciprocal compensation. We find that it would be inappropriate to depart from that policy in this proceeding. Although the FCC has concluded that ISP traffic is largely interstate, it has also observed that ISP traffic should not be subject to interstate access charges and has yet to develop a compensation structure for this traffic. In the absence of a federal rule, we believe that reciprocal compensation is a logical and reasonable method of compensating carriers for the costs incurred to terminate traffic to ISPs.²²

Later, in a contract enforcement action brought by ELI against US WEST²³, the Oregon Commission reached the same conclusion, stating as follows:

The ISP Decision, in which the FCC interpreted its policy on the nature of ISP traffic, does not support US WEST's position. In the ISP Decision, the FCC held that ISP traffic is jurisdictionally mixed but is largely interstate in nature. However, the FCC also stated that this determination is not dispositive of interconnection disputes currently before state commissions. The ISP Decision also acknowledges – contrary to US WEST's assertion that the FCC has historically treated ISP traffic as interstate – that the opposite is in fact true. "When construing the parties' agreements to determine whether the parties so agreed [to treat ISP traffic as local], state commissions have the opportunity to consider all relevant facts, *including the negotiation of the agreements in the context of this Commission's longstanding policy of treating the traffic as local, . . .*"

²² *Electric Lightwave, Inc. – GTE Arbitration, supra*, at 3.

²³ *Electric Lightwave, Inc. v. US WEST Communications, Inc.*, Order No. 99-285 (Or. P.U.C., April 26, 1999).

The FCC specifically noted that it treats ISPs as end users for purposes of assessing access charges and exempts ISPs from payment of these charges. The FCC also noted that it permits ISPs to purchase their links to the public switched telephone network through intrastate business tariffs rather than interstate access tariffs, which allows ISPs to pay local business rates and interstate subscriber line charges for their switched connections to local exchange company central offices. In addition, the FCC also pointed out that incumbent local exchange company (ILEC) expenses and revenues associated with ISP traffic have traditionally been characterized as intrastate for separation purposes.²⁴

Finally, when faced with a request for an order from GTE determining the scope of its reciprocal compensation obligations in light of the FCC's *Declaratory Ruling*, the Public Utilities Commission of Hawaii rejected GTE's interpretation of that *Declaratory Ruling*, stating in part as follows:

our reading of the FCC Order leads us to conclusions that are contrary to GTE Hawaiian Tel's request. In particular, we conclude that: (1) the FCC did not intend to interfere with our findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic; (2) our prior Docket No. 7702 rulings on ISP-bound traffic are not in conflict with the FCC Order; (3) parties that have agreed to include ISP-bound traffic within their interconnection agreements are bound by those agreements, as interpreted and enforced by state commissions; and (4) where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, we nonetheless may determine in arbitration proceedings at this point that reciprocal compensation should be paid for such traffic.²⁵

The impact of these cases on the pending proceeding cannot be overstated. GTE has had a full and fair opportunity to litigate the issue presented by Starpower's complaint, and it has lost

²⁴ *ELI v. US WEST*, *supra*, at 6 (citations omitted, emphasis in original).

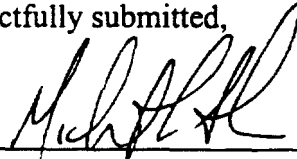
²⁵ *Petition of GTE Hawaiian Telephone Company Incorporated*, *supra*, at 3 (footnotes and citations omitted).

every argument. Under the circumstances, no formal hearing should be required and, instead, the Commission should rule against GTE now, on the pleadings presented.

CONCLUSION

The Commission's *Cox Decision* was correct when it was issued on October 24, 1997, and it is correct now. There is no basis for vacating or ignoring the underlying legal principle announced in the *Cox Decision* and it applies with equal force here today. In the interests of promoting competition in the local exchange market in Virginia, KMC, Hyperion and CFW respectfully ask the Commission to find in favor of Starpower Communications, LLC on its complaint against GTE and to order GTE to pay reciprocal compensation for all local calls, including calls to ISPs.

Respectfully submitted,



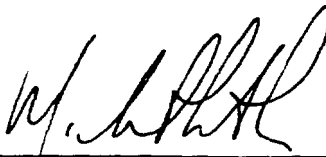
Richard M. Rindler
Michael L. Shor (Va. Bar No. 28478)
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (telephone)
(202) 424-7645 (fax)

Dated: July 19, 1999

Counsel for KMC Telecom of Virginia, Inc.,
Hyperion Communications of Virginia, LLC, and
CFW Network, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July, 1999, a true and correct copy of the foregoing Comments of KMC Telecom of Virginia, Inc., Hyperion Communications of Virginia, LLC, and CFW Network, Inc. In Response To GTE South, Inc. was served by first class mail, postage pre-paid upon the parties identified on the attached list:

A handwritten signature in black ink, appearing to read 'M. L. Shor', is written over a horizontal line.

Michael L. Shor

**Edward D. Gary
Gregory M. Romano
Hunton & Williams
E. Byrd Street
Richmond, VA 23219**

**Kimberly A. Newman
Hunton & Williams
1900 K Street, N.W.
Suite 1200
Washington, D.C. 20036**

**Louis R. Monacell, Esquire
Robert M. Gillespie, Esquire
Christianson & Barton, L.L.P.
9 East Main Street, Suite 1200
Richmond, VA 23219-3095**

**Eric M. Page, Esquire
LeClair Ryan
4201 Dominion Boulevard, Suite 200
Glen Allen, VA 23060**

**John F. Dudley
Senior Assistant Attorney General
Division of Consumer Counsel
Office of the Attorney General
10 East Main Street, 2nd Floor
Richmond, VA 23219**

**State Corporation Commission
Office of the General Counsel
Tyler Building - 10th Floor
Richmond, VA 23219**

